In re Application of: Gross	) Art Unit: *3625*
	)
Serial No.: *10/770,937*	) Examiner: Rosen, Nicholas
	)
Filed: *02/2/2004*	)
	)
For: *Method of providing access to playable media*	)

Appeal Brief filed under 37 C.F.R. § 1.192

Mail Stop Appeal Brief - Patents
Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

Dear Sir:

Per 37 C.F.R. § 41.37 Appellants submit the present Appeal Brief in furtherance of the Notice of Appeal filed in this case on February 4, 2010.

Please charge any fees in accordance with the accompanying Transmittal letter. A short introduction of the prosecution history is first presented. This brief also contains the following sections as required by 37 C.F.R. § 41.37 and MEP § 1206:

I.   Real Party In Interest

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BRIEF INTRODUCTION AND REVIEW OF PROSECUTION HISTORY

This brief is presented in support of the Notice of Appeal filed for application serial no. 10/770,937, which was filed February 2, 2004 and derives priority from a provisional application serial no. 60/443,940 filed January 31, 2003.

1. Originally filed claims 1 – 36 were rejected under 35 USC §103 in a first Office Action mailed October 11, 2006. Claims 1 – 35 were rejected in light of Hastings (US Patent No. 6,584,450) in view of Ostrom (an article titled "New Releases, Netflix users Can Anticipate a Very Long Wait"). Claim 36 was rejected under 35 USC §103 in light of Hastings and Office Notice.

2. The rejections were then addressed by an Amendment & Response A filed April 11, 2007. The claims were amended to distinguish over the references of record.

3. In a second/Final Office Action mailed July 11, 2007 the Examiner repeated the §103 rejection of the independent claims (1, 35 and 36) based on Hastings et al./Ostrom and/or Official Notice. A new reference – Kolawa (U.S. Patent No. 6,370,513) was cited with Hastings and Official Notice against independent claim 36.

4. Some of the dependent claims were rejected in light of new references cited: Raphel et al. (US Publication No. 2003/0023743) (claim 5); Berstis (U.S. Patent No. 6,105,021) (claim 6); Postelnik et al. (U.S. Publication No. 2006/0218054) (claims 9, 10, 11); Jacobi (U.S. Patent No. 6,317,722) (claim 12); Davis (U.S. Patent No. 6,105,006) (claim 13); Nakagawa (U.S. Publication No. 2002/0046129) (claim 14); Kamel et al. (U.S. Publication No. 2001/0014145) (claim 16). Official Notice was newly applied to claims 20, 21, 25 26, 27, 32, 33, 34.

5. A first appeal was filed on December 11, 2007. After full briefing, a decision was rendered on March 30, 2009, upholding the rejections of the claims, albeit on a different basis than that used by the Examiner. Consequently a request for reconsideration/rehearing was filed on June 1, 2009, which was granted in part on October 1, 2009. The Decision reads:

> Our decision to affirm the decision of the Examiner to reject the claims on appeal under 35 U.S.C. § 103(a) over Hastings in view of Ostrom and various other references used to reject dependent claims has not been shown to have been erroneous. However, because in so affirming we used a different rationale than that articulated by the Examiner, we grant the request for rehearing only to the extent that we denominate the Decision a new ground of rejection under 37 C.F.R. § 41.50(b).

6. The Board's March 30 decision upheld the rejection not based on the Examiner's argument, but instead on different grounds based on the observation that claim 1 as submitted:

   "….does not require that the list always include at least one playable media, as asserted by the Appellant because the claim language is conditional upon a confirming response back from the subscriber as to whether to include the media or not."

   See Decision of September 29, page 3.

7. In response to the Board's analysis, the Applicant amended the claims on November 30, 2009. In particular, the Applicant specifically amended the claim to recite that the steps are repeated as needed when an <u>automatic refill option</u> is enabled. This option controls the subscriber delivery queue so that it <u>does indeed include at least one playable media item that is accepted for delivery by such subscriber</u>. In other words, the Appellant amended the claim (consonant with the Board's perspective) to reflect that the list does always include at least one item, by confirmation of the subscriber, which could of course be explicit or implicit (i.e., based on a passage of time or some other factor as noted in the specification).

8. The Examiner rejected the claims again on February 3, 2010, based on an argument that the <u>Hastings</u> reference also discloses this type of type of behavior as well.

9. The Applicant now appeals this latest rejection.

I.   REAL PARTY IN INTEREST

Media Queue, an Oklahoma Limited Liability Company with its principal place of business at 2431 East 61st Street, Suite 320, Tulsa, Oklahoma 74136.

II.   RELATED APPEALS AND INTERFERENCES

A related application serial no. 10/771,049 claiming priority to the same provisional as the instant case matured into U.S. Patent No. 7,389,243 which is now the subject of litigation in the ND of California titled MEDIA QUEUE V. NETFLIX ET AL., NO. CV-09-01027, and reexamination control no. 95/000469. Additional cases filed by the Applicant which are or have been the subject of appeal include serial nos. 11/369,796 (Media delivery prioritization system and method); 11/369,660 (Method of processing rental requests and returns); 10/874,412 (Method of processing rental requests and returns); 10/770,767 (Media Queue Monitor); and 10/770,804(System for providing access to playable media). Other than these actions, there are no other appeals, interferences or judicial proceedings known to Appellant, Appellant's legal representative, or the Assignee of the present application which will directly affect or be directly affected by or have a bearing on the Board's decision in this appeal.

III.   STATUS OF CLAIMS

Claims 1 – 36 are pending. Claims 1, 35 and 36 are independent. All claims are rejected. A complete copy of the pending claims is provided in Appendix A.

IV.   STATUS OF AMENDMENTS

Appellant has not filed any further amendments.

V.   SUMMARY OF CLAIMED SUBJECT MATTER

Independent claim 1

Independent claim 1 covers:[1] A method of distributing playable media items over an electronic network (*FIG. 7, 702*) from a first computer maintained by a provider of a media distribution service (*FIG. 7, 720*) to a second computer used by a subscriber of such service (*FIG. 7, S1, S2,….*) the playable media items corresponding to machine readable media readable by a subscriber machine player (*page 6, ll. 4 – 17*), the method comprising the steps of:

(a)   setting up a subscriber selection queue for the subscriber to be controlled by the first computer, said subscriber selection queue consisting of an ordered list of one or more playable media items to be delivered to the subscriber in a subscriber-defined priority; (*FIG. 1, see region 110 and text at page 7, ll. 16 – page 8, l. 32 regarding prioritization*)

wherein said subscriber selection queue is set up at least in part in response to item selection directions provided by the subscriber over the network using the second computer; (*id*)

(b)   setting up queue replenishment control rules for the subscriber selection queue including an automatic queue refill option; and (*FIG. 1, portion 116 of interface; FIG. 2, and description at page 10, l. 17 – page 16, l. 7*) and

(c)   monitoring said subscriber selection queue in accordance with said queue replenishment control rules to automatically determine with said first computer if an additional playable media item should be added to said subscriber selection queue; and (*FIG. 4 and description at page 18, l. 28 – page 21, l. 22*); and

(d)   automatically modifying said subscriber selection queue with said first computer to generate a new ordered list of one or more playable media items in response to the subscriber confirming that said additional playable media item can be included in said subscriber selection queue;(*FIG. 4 and description at page 18, l. 28 – page 21, l. 2, particularly box 485; also FIGs. 3A – 3C for format of explicit confirmations*)

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[1] In the interest of efficiency and clarity Applicant has not identified every single aspect of the disclosure which may pertain to the claimed limitations.

wherein steps (c) and (d) are repeated as needed when said automatic queue refill option is enabled so that said subscriber selection queue is maintained automatically for the subscriber so as to include at least one playable media item which is accepted for delivery by such subscriber. (*Id; see particularly boxes 430 (trigger event); box 435 (recommendations); 450 (autoship); and discussion at page 12, l. 2 - page 13, l. 3; page 17, l. 24 – page 18, l. 25*)

Independent claim 35

Claim 35 covers a method of distributing playable media items comprising the steps of:

    (a) setting up a subscriber selection queue for the subscriber, said subscriber selection queue consisting of a list of one or more playable media items to be viewed by the subscriber;

wherein said subscriber selection queue is set up at least in part in response to item selection directions provided by the subscriber; (*FIG. 1, see region 110 and text at page 7, ll. 16 – page 8, l. 32 regarding how subscriber sets up list*)

    (b) setting up queue replenishment control rules for the subscriber selection queue including an automatic queue refill option; and (*FIG. 1, portion 116 of interface; FIG. 2, and description at page 10, l. 17 – page 16, l. 7*)

    (c) automatically monitoring said subscriber selection queue in accordance with said queue replenishment control rules to automatically determine with a first computing system if changes should be made to said subscriber selection queue; (*FIG. 4 and description at page 18, l. 28 – page 21, l. 22*);

wherein said monitoring includes analyzing the content and/or characteristics of other playable media items within said subscriber selection queue to determine said changes; and (*id; also description of threshold options #2 and #3 on page 13*);

    (d) automatically modifying said subscriber selection queue with said first computing system to generate a new list of one or more playable media items based on a confirmation from the subscriber;(*FIG. 4 and description at page 18, l. 28 – page 21, l. 2, particularly box 485; also FIGs. 3A – 3C for format of explicit confirmations*)

wherein steps (c) and (d) are repeated as needed when said automatic queue refill option is enabled so that said subscriber selection queue is maintained automatically for the subscriber so as to include at least one playable media item which is accepted for delivery by such subscriber. (*Id; see particularly boxes 430 (trigger event); box 435 (recommendations); 450 (autoship); and discussion at page 12, l. 2 - page 13, l. 3; page 17, l. 24 – page 18, l. 25*)

Independent claim 36

Claim 36 covers a method of distributing playable media items over an electronic network to a subscriber of a media rental service (*see FIG. 7*), the method comprising the steps of:

(a) receiving subscriber preference data for the subscriber during a first data session, including notification options and automatic shipment options; (*FIG 1; region 116 and related discussion; FIG. 2, see regions 230 and 250 and related text at page 14, l. 6 – page 16 l. 10*)

(b) generating a subscriber profile for the subscriber suitable for use by a recommender system; (*id and also FIG. 6 and related discussion at page 23, ll. 15+*)

(c) processing said subscriber profile using said recommender system to identify a media item that is likely to be of interest to the subscriber; (*id; see also FIG. 4, box 435 and related discussion*)

(d) notifying the subscriber and shipping said media item to the subscriber in accordance with said subscriber preference data; (*FIG. 4 and description at page 18, l. 28 – page 21, l. 2, particularly box 485; also FIGs. 3A – 3C for format of explicit confirmations*)

wherein said media item can be automatically shipped to the subscriber after said first data session, and without requiring a second data session by the subscriber with said media rental service; (*id see particularly discussion for autoship option 230 (FIG. 2) and decision box 450 (FIG. 4) and options available in email embodiments 3A – 3C (i.e., box 330)*)

(e) repeating step (c) to automatically select and maintain at least one additional media item to be available for immediate delivery to the subscriber at all

times; (*Id; see particularly boxes 430 (trigger event); box 435 (recommendations); 450 (autoship); and discussion at page 12, l. 2 - page 13, l. 3; page 17, l. 24 – page 18, l. 25*)

(f) delivering said at least one additional playable media item when it is accepted by the subscriber;

(g) repeating step (e) when an automatic shipment option is enabled until said subscriber accepts an additional playable media item for delivery. *(id; see specifically options made available to member in FIGs. 3A to 3C, particularly option box 330 and 350)*

These features and others are described in more detail below.

VI.   GROUNDS OF REJECTION TO BE REVIEWED ON APPEAL

The issues presented for appeal are whether:

1. Independent claims 1, 35 and dependent claims 2, 3, 4, 7, 8, 15, 17, 18, 19, 22, 23, 24, 28, 29, 30 and 31 are unpatentable under § 103 in light of Hastings et al (U.S. Patent No. 6,584,450) taken with Ostrom; and whether:

   (a) Dependent claim 5 is unpatentable under § 103 in light of the above and further in view of Raphel et al. (US Publication No. 2003/0023743);

   (b) Dependent claim 6 is unpatentable under § 103 in light of the above and further in view of Berstis (U.S. Patent No. 6,105,021);

   (c) Dependent claim 9 is unpatentable under § 103 in light of the above and further in view of Postelnik et al. (U.S. Publication No. 2006/0218054);

   (d) Dependent claims 10 – 11 are unpatentable under § 103 in light of the above and further in view of Postelnik et al. (U.S. Publication No. 2006/0218054) and Official Notice;

   (e) Dependent claim 12 is unpatentable under § 103 in light of the above and further in view of Jacobi (U.S. Patent No. 6,317,722);

   (f) Dependent claim 13 is unpatentable under § 103 in light of the above and further in view of Davis (U.S. Patent No. 6,105,006);

   (g) Dependent claim 14 is unpatentable under § 103 in light of the above and further in view of Nakagawa (U.S. Publication No. 2002/0046129);

   (h) Dependent claim 16 is unpatentable under § 103 in light of the above and further in view of Kamel et al. (U.S. Publication No. 2001/0014145);

   (i) Dependent claims 20, 21, 25 26, 27, 32, 33, 34 are unpatentable under § 103 in light of the above and further in view of Official Notice;

2. Independent claim 36 is unpatentable under § 103 in light of Hastings et al (U.S. Patent No. 6,584,450) taken with Ostrom and Official Notice.

VII.   ARGUMENT

The present invention relates, in general, to the field of electronic commerce systems and methods of providing selections, shipments and exchanges of rental items. In conventional contemporary systems, such as implemented at a popular website maintained by Netflix® (and Blockbuster®), subscribers can search, review and select movie titles (in DVD media format) within a graphical interface. If a particular title is available, the subscriber's choice is then placed into a rental selection "queue" maintained by a server. During an interactive online session, a subscriber can select a number of titles, and then prioritize them in a desired order for shipment within the selection queue.

After the movie title <u>selection</u> session is over, the system proceeds to ship the desired titles in the order requested by the subscriber. After shipment, these titles then appear in a separate list identified essentially as items that are outstanding (i.e., movies that have not yet been returned by the user) within a "titles out" or shipped queue.

One main known deficiency of these commercial systems is that the user is required to periodically visit and replenish his/her selection queue in order to maintain a steady supply of content. This requires the user to initiate another session with the provider's website, log in to their account, view their queue, parse potential titles for inclusion in the selection queue, etc. If the user does not continually place movies into the selection queue, it is possible that he/she will receive the last movie in their queue and then not receive another title because an express selection was not made. This is especially disadvantageous for DVD rental by mail systems, since there is a mailing time lag which the user cannot cure retroactively. In other words, if the user notices a few days later that their selection queue is empty, it will still take a few days to process and deliver any new selection that the user may make on that particular day. Since the bulk of subscribers are on a fixed payment plan, meaning that they pay the same amount whether they see X or X+1 titles per billing period, and each title costs them $$ to ship, the disclosure pointed out that the commercial operators of such systems had little or no economic incentive to reminder users that they are under-utilizing their accounts.

The claims of the present application are addressed to this deficiency in the prior art.

1. **Independent claims 1, 35 and dependent claims 2, 3, 4, 7, 8, 15, 17, 18, 19, 22, 23, 24, 28, 29, 30 and 31 are patentable over <u>Hastings et al</u> (U.S. Patent No. 6,584,450) taken with <u>Ostrom</u>**

<u>Independent claim 1</u>

The Examiner's rejection of the claim should be reversed for several reasons. In rejecting claims under 35 U.S.C. § 103, it is incumbent upon the Examiner to establish a <u>factual</u> basis in order to support the legal conclusion of obviousness. <u>See</u> <u>In re Fine</u>, 837 F.2d 1071, 1073 (Fed. Cir. 1988). First and foremost, the references simply do not factually include the teachings that the Examiner contends are present therein. The main issue now for claim 1 is that the Examiner acknowledges that the primary reference:

> Hastings does not expressly disclose that steps (c) and (d) are repeated as needed when the automatic queue refill option is enabled so that the subscriber selection queue is maintained automatically for the subscriber so as to include at least one playable media item which is accepted for delivery by such subscriber, although

> Hastings does disclose replenishment control rules that can, in effect, include an automatic queue refill option (column 9, line 63, through column 10, line 14), and this automatic selection process appears to be directed to assuring a queue containing movies for subscribers to rent. However, Ostrom further teaches a recommendation process to lead consumers to movies they might not otherwise have known about (paragraph beginning, "Using a proprietary algorithm-based technology"). Because this is described as "lead[ing] consumers to movies they might not otherwise have known about," rather than automatically delivering movies based on recommendations, and because, "Based on rentals driven by the Netflix recommendation system, the niche movie 'Memento' has become the ninth-most *requested* film of all time by Netflix users," it is implied that at least some movies are accepted for delivery by the subscribers.

See Final Office Action, pages 4 – 5. This contention about the purported teaching of the references is easily demonstrable to be incorrect.

First, as concerns the citation to Hastings (col. 9, l. 63 – col. 10, l. 14) the Examiner's argument falls short because it is at best ambivalent and unclear. On the one hand the Examiner states that the reference does *not* "expressly" disclose this limitation, but then tries to suggest that it "...*can*, in effect, include an automatic refill option..." (emphasis added). This level of ambiguity is clearly not sufficient to sustain an inherency argument. Under the caselaw, in relying upon the theory of inherency, the examiner must provide a basis in fact and/or technical reasoning to reasonably support the determination that the allegedly inherent characteristic *necessarily* flows from the teachings of the applied prior art." Ex Parte Levy, 17 USPQ2d 1461, 1464 (BPAI 1990) (citations omitted). The equivocal nature of the Examiner's contention reveals that it cannot meet this standard, and he has certainly not provided a basis in fact to demonstrate that Hastings *necessarily* operates in the manner set out in the claim.

More notably, it is apparent from this passage in Hastings that it is not an "automatic queue refill option" that causes steps (c) and (d) to be "....repeated as needed when said automatic queue refill option is enabled so that said subscriber selection queue is maintained automatically for the subscriber so as to include at least

one playable media item which is accepted for delivery by such subscriber." As noted in the present specification, this corresponds to an option whereby the subscriber elects to have the automated system ensure that some title is always in their selection queue. By designating this option the subscriber implicitly/explicitly accepts it for delivery.

The excerpts from Hastings cited by the Examiner include the following (col. 9 – col. 10):

> In step 606, customer 502 creates and provides movie selection criteria to provider 504 that indicates movies that customer 502 desires to rent. For example, the movie selection criteria may specify particular movie titles that

> customer 502 desires to rent. The movie selection criteria may also specify an order or priority in which customer 502 wishes to rent the movies. Instead of identifying particular movie titles, the movie selection criteria may specify movie
> 5 preferences for customer 502, e.g., types of movies, directors, actors, or any other movie preferences or attributes. In this situation, provider 504 automatically selects particular titles that satisfy the movie selection criteria. For example, the movie selection criteria may
> 10 specify a preference for action movies starring a particular actor, with a preference for "new release" movies. Provider 504 attempt to provide movies to customer 502 that best satisfy the preferences indicated by the movie selection criteria.

The only thing <u>Hastings</u> is talking about here is the subscriber's initial interaction to "select" movies that he or she likes. That is, <u>Hasting's</u> system lets a user peruse and search an online catalog to identify titles that they like to "fill" their list. The items on the list can be based on preferences the user may specify, so that if he/she says they want to see Spielberg movies, the system "automatically selects" those titles for consideration by the user. This is not describing anything more than typical search engine behavior. But the user must still approve what movies are added to his/her list, or add them manually to his or her list. If all the items on the list are delivered, there is nothing to suggest that the list is "refilled" for them by the system under another separate option to accomplish such task. A simplified rendition of <u>Hasting's</u> system is shown below:

Hastings/Ostrom List
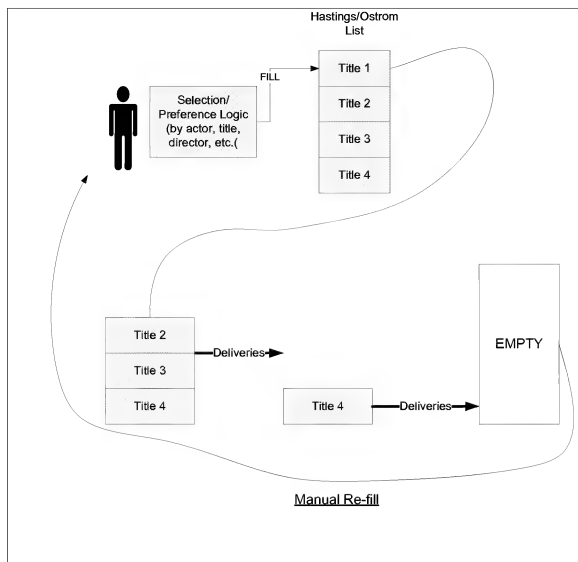
As seen above, a user on the top left can manually specify particular selections by different preferences, which results in automatic selections being presented to him/her. These selections are not automatically added; but can then be selected by the user to initially fill the user's list (Title 1, Title 2, etc.) After that point, the system starts to deliver the titles until, as seen in the bottom part of the diagram, the user's list is now completely empty. If the user in <u>Hastings</u> wants to "re-fill" their list, they must return to the system and manually enter the selections as before.[2] Thus the "automatically selects" language in <u>Hastings</u> refers generically to providing choices for titles to subscribers to perform an initial fill of their list, not that it is ensuring that the subscriber's selection queue is later "refilled" or maintained to always includes at least one title.

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[2] In fact, as explained in related prosecutions, the <u>Hastings</u> refererence not only does not do automatic refilling, it doesn't even bother telling the user that their list is empty.

Accordingly <u>Hastings</u> does not teach a separate automatic queue <u>refill</u> option. When the user's queue is emptied, as a result of seeing every movie that meets their criteria, there is nothing in <u>Hastings</u> that is described as refilling that selection queue automatically for him/her to maintain at least one title.[3]

To establish inherency, the extrinsic evidence must make clear that the missing descriptive matter is necessarily present in the thing described in the reference, and that it would be so recognized by persons of ordinary skill. Inherency, however, may not be established by probabilities or possibilities. The mere fact that a certain thing may result from a given set of circumstances is not sufficient.' <u>In re Robertson</u>, 169 F.3d 743, 745 (Fed. Cir. 1999) (citations omitted) (internal quotation marks omitted). To the extent the Examiner is relying on the above to argue for a <u>separate refill</u> option, he must show that this feature is inherently present in the disclosure, which evidence he has not provided to date. Given that the disclosure is too thin to be read persuasively to include such behavior, Appellant submits that this burden cannot be met.[4]

<u>Ostrom</u> is equally unavailing. The Examiner cites to a section of <u>Ostrom</u> in which is stated that a person can get recommendations for movies that they may not know about. The Examiner then says that a user may or may not select such titles, which may or may not result in such title being received. Again, all this is saying is that a subscriber can fill his or her list with titles. It says/suggests <u>nothing</u> about an automated <u>refill</u> option process that is repeated as needed so that the subscriber selection queue is maintained automatically to include at least one playable media item which is accepted for delivery.

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[3] <u>Hastings</u> says the "...movie selection criteria may specify a preference for action movies starring a particular actor, with a preference for "new release" movies." But, as one can plainly envision, there will be many occasions in which there are no movies that satisfy such criteria, yet <u>Hastings</u> makes no mention of how to address this dilemma. In other cases even if there is a title that meets the subscriber's criteria, it may be unavailable or allocated to another user. In short, <u>Hastings</u> does not in fact teach maintaining a queue "automatically" for the subscriber to ensure a steady delivery of titles.

[4] Nor do the "Max Turns" and "Max Out" options fulfill this role. These options deal with a different concept, namely, limiting how many titles the user can see within a particular billing cycle (MAX TURNS) or how many they can have in their possession at one time (MAX OUT). But if the user's selection list is empty, b/c there are no movies that they have selected, or nothing otherwise meets their preferences, then nothing is shipped to him/her regardless of what the setting is for MAX TURNS or MAX OUT. If there is no title to pick from, then these terms are irrelevant.

The Examiner is clearly using too broad of a brush to interpret the references and the claims. He does not include specific details to support the current rejection. As noted in a recent decision:

> If we analogize claim construction to a painting, then the Examiner uses too broad a brush, construing the disputed limitation too broadly, and glossing over its details. Appeal 2009-004118 (December 11, 2009)

Here the Examiner does not map up specifically how Ostrom teaches any part of the limitation, except to note above that the user can get recommendations. This is clearly not meeting the entirety of the claim limitations. Consequently Appellant submits that the rejection of claim 1 is clearly in error.

Independent claim 35

This claim should be allowable for at least the same reasons as claim 1. Moreover this claim states that the monitoring is done automatically and includes "… analyzing the content and/or characteristics of other playable media items within said subscriber selection queue…" to determine what changes should be made, if any to the same. Against this limitation the Office Action states merely that:

> "…it is likewise *obvious* for the monitoring to include analyzing the content and/or characteristics of other playable media items within the selection queue to determine the changes, so as to accomplish the disclosed purpose of providing the subscriber with movies according to his selected criteria, as taught by Hastings." See page 15 - 16 of the Final Office Action.

In short the Examiner acknowledges that Hastings does not teach this limitation, but insists that it is obvious because this type of operation could be used to provide the subscriber with movies according to his selected criteria. The problem, again, is that Hastings makes no such mention or suggestion, and the Examiner cites to no other reference to support this type of operation. Again Hastings indicates that the service allows subscribers to select titles based on his/her favorite actor, director, etc. But there is absolutely no mention of the system doing monitoring based on analyzing the content of other selections made by the subscriber.

At its core the Examiner's rejection here is simply a "design choice" argument without the express label. In effect, he is stating that it would have been a design choice to him to do the monitoring based on the content and/or characteristics of other playable media items within the subscriber selection queue, as opposed to what

<u>Hastings</u> actually teaches. He has no reference or evidence of any kind, so he is merely substituting his own unsupported opinion about what would have been obvious. This type of rejection was recently addressed and reversed in Appeal 2009-004928 (April 23, 2010):

> The Appellants argue that the Examiner has misapplied the "design choice" rationale. We agree with the Appellants that, with respect to claim 13, the Examiner has not made out a prima facie case of obviousness. Resorting to "design choice" is, without more explanation, a conclusory statement that is insufficient as a rationale for establishing a prima facie case of obviousness for the claimed subject matter with all its limitations. "[R]ejections on obviousness grounds cannot be sustained by mere conclusory statements; instead, there must be some articulated reasoning with some rational underpinning to support the legal conclusion of obviousness." KSR., 550 US at 417-418 (citing In re Kahn, 441 F.3d 977, 988 (Fed. Cir. 2006)). Because no articulated reasoning with some rational underpinning to support the legal conclusion of obviousness has been presented, we will not sustain the rejection of claim 13.

The Examiner's rejection is simply a circular conclusory statement that because <u>Hastings</u> teaches that subscribers *can* give preferences for their movies, any mechanism that goes about satisfying such preferences would have been obvious because Hastings also generally teaches that such preferences should be satisfied. Nonetheless there is simply no proffered rationale why one skilled in the art would have selected the particular and specific type of monitoring set out in claim 35.

<u>Claim 4</u>:

<u>Ostrom</u> is not referring to an *additional* playable media item; it is referring to re-arranging a *preexisting* item in the subscriber's queue, or letting the subscriber add something manually. Thus, it does not teach permitting the subscriber to define the delivery order position in which a new item is automatically added.[5]

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[5] To address a point raised previously by the Board: It should be noted, also, that claim 4 depends from claim 3, which recites both "a *first* playable media item to be delivered from said subscriber <u>selection</u> queue to a *last* playable media item to be delivered from said subscriber <u>selection</u> queue." The argument, therefore, that such claim reads on a situation in which there is only one item in a queue is an unreasonable interpretation of the claim. <u>Claim 4</u> says "one or more" because at the moment when the new title is inserted one of the first/last items may be delivered to the subscriber, leaving a situation where there is momentarily one item in the queue, but after the new item is inserted there are at least two again.

<u>Claims 17 - 19</u>:

Applicant disagrees with the Examiner that <u>Hastings</u> discloses a "recommender system" as that term is understood in the art. The specification makes clear what a recommendation system is (see page 1, ll. 28+), and there is no such mention of this type of a system in <u>Hastings</u> that meets such criteria. In the latter the user must make all of their preferences explicit; there is no automated determination of a user's tastes.

While other prior art cited by the Applicant includes recommenders (see Background of the Invention) the Examiner has not cited or relied on the same. Moreover these systems did not operate as set out in claims 17 – 19. As an example, the system of <u>claim 17</u> works autonomously based on a trigger event to add another item automatically to the subscriber's selection queue. The prior art relies solely on a manual interaction with the system to derive such recommendations.[6]

<u>Claim 19</u> clarifies that the recommender system automatically identifies playable media items of interest to the subscriber based on a subscriber item preference profile. Furthermore, neither <u>Ostrom</u> nor <u>Hastings</u> says anything about bumping a recommended title to the top of the queue, as set out in <u>claim 18</u>.[7] <u>Ostrom</u>, again, is merely referring to the user being able to manually select and place titles where he/she wants. The rejections of claims 17 – 19 is erroneous for these additional reasons as well.

(a)   **Response to dependent claim 5 being rejected under § 103 in light of Hastings/Ostrom and further in view of Raphel et al. (US Publication No. 2003/0023743)**

The Appellant does not argue the patentability of claim 5 separately. The rejection should be reversed however based on the discussion above for claim 1.

---

[6] The other "trigger event" previously noted by the Board has nothing to do with the type of behavior set out in this claim, but, rather, deals with removing a title from the queue after it is shipped.

[7] To address an earlier point by the Board, the "next to be delivered" item in the selection queue is indeed at the *top* of the selection queue, as can be seen with reference to the specification and figures. Therefore the claim already linguistically distinguishes over <u>Hastings</u>. The other argument that claim 18 is met by <u>Hastings</u> adding "recommended" titles to an empty queue is erroneous for the reasons set forth

(b) **Response to Dependent claim 6 being rejected under § 103 in light of Hastings/Ostrom and further in view of Berstis (U.S. Patent No. 6,105,021)**

The Appellant does not argue the patentability of claim 6 separately. The rejection should be reversed however based on the discussion above for claim 1.

(c) **Response to Dependent claim 9 being rejected under § 103 in light of Hastings/Ostrom and further in view of Postelnik et al. (U.S. Publication No. 2006/0218054)**

The Appellant does not argue the patentability of claim 9 separately. The rejection should be reversed however based on the discussion above for claim 1.

(d) **Response to dependent claims 10 – 11 being rejected under § 103 in light of Hastings/Ostrom and further in view of Postelnik et al. (U.S. Publication No. 2006/0218054) and Official Notice.**

These claims depend from claim 9 and are not argued separately.

(e) **Response to dependent claim 12 being rejected under § 103 in light of Hastings/Ostrom and further in view of Jacobi (U.S. Patent No. 6,317,722)**

For claim 12, the Examiner relies on the teaching from Jacobi of sending a link with an embedded URL and argues it would be added to Hastings "…*for the obvious advantage of profiting from selling (or renting) items to the subscriber that the subscriber is likely to be interested in*." The deficiency in this argument lies in the fact that Hastings et al. is a fixed rate, all you can consume system, in which the revenues per cycle are constant regardless of how many movie titles the user views. In contrast, each "item" in Jacobi that the user purchases from the shopping cart increases revenue and profitability, while each additional item consumed by the subscriber in Hastings within a certain cycle increases their cost. It is clear why Jacobi would want to inform the user of additional opportunities or the state of information in such cart, but there is an equally clear disincentive to adopt such type of functionality in Hastings at the time of

(..continued)
above: there is no recommender in Hastings (claim 1, 17), and no triggering event associated with adding titles.

filing the invention. For this reason it can be seen that _Hastings_ teaches away from implementing a _Jacobi_ type notification.

(f) Response to dependent claim 13 being rejected under § 103 in light of _Hastings/Ostrom_ and further in view of _Davis_ (U.S. Patent No. 6,105,006)

For _claim 13_: see claim 12. This claim notes that an automatic modification occurs after a predefined time delay. The Examiner states that the combination of _Hastings_ and _Davis_ would occur "...for at least the obvious advantage of giving someone (the subscriber, or an administrator) time to make any manual modification which seem indicated." This rationale, however, merely parrots the claim language and reflects the Examiner's parsing of the Appellant's specification as a blueprint to derive motivation evidence. See Applicant's disclosure at page 15:

> "...This allows for subscribers to further designate a class of selections for which they are not entirely sure that they want shipped, but which can wait in abeyance in the queue until they are confirmed. "

There is no such teaching, express or implied anywhere – outside the Applicant's specification - to add a predefined time delay as taught in the claim in this type of application.

(g) Response to dependent claim 14 being rejected under § 103 in light of _Hastings/Ostrom_ and further in view of _Nakagawa_ (U.S. Publication No. 2002/0046129)

This claim depends from claim 9 and is not argued separately.

(h) Response to dependent claim 16 being rejected under § 103 in light of _Hastings/Ostrom_ and further in view of _Kamel et al_. (U.S. Publication No. 2001/0014145)

For _claim 16_: the Examiner combines _Hastings/Ostrom_ with _Kamel_ – which makes no mention or reference anywhere to a queue, playable media items, etc., etc. It is only referenced by the Examiner because it mentions a queue in connection with an electronic message machine. The reference is at best, tangential and provides no suggestion or even a hint to a skilled artisan to modify a system like _Hastings_ to incorporate like functionality.

Under the present rejection, the Examiner seems to be treating any and all electronic systems which use a queue as analogous no matter where or how they are used or implemented. This is not an appropriate conclusion anymore than the notion rejected in cases such as In re Oetiker, 977 F.2d 1443, 1445 (Fed. Cir. 1992) where it was determined that not every mechanical fastener in any field was somehow analogous art. The Kamel reference is clearly not analogous art to an e-commerce application involving subscriber queues, and would never be considered by one skilled in this field of art.

For this reason alone the Appellant submits that the rejection is in error and should be reversed.

    (i)   **Response to dependent claims 20, 21, 25 26, 27, 32, 33, 34 being rejected in light of <u>Hastings/Ostrom</u> and further in view of <u>Official Notice</u>**

These claims depend from claim 1 and are not argued separately.

2. <u>The Rejection of Claim 36 Is In Error</u>

This claim is erroneously rejected for at least the same reasons as claims 1 and 35.[8] Moreover the claim includes additional limitations that the Examiner has attempted to address solely by reference to "official notice" as set out below. In particular, claim 35 states:

    ....

    (d)   repeating step (c) to automatically select and maintain at least one additional media item to be available for immediate delivery to the subscriber at all times;

    (e)   delivering said at least one additional playable media item when it is accepted by the subscriber;

    (f)   *repeating step (e) when an automatic shipment option is enabled until said subscriber accepts an additional playable media item for delivery.*

---

[8] Moreover the Applicant further submits that the Examiner's contention concerning <u>Hastings</u> disclosing a "recommender system" is apparently inaccurate. <u>Hastings</u> makes no mention of a recommendation system as far as Applicants can determine. It merely describes that it receives user criteria on movies and provides movies per such criteria. There is no hint or suggestion of a system that gives "recommendations" to users.

The Examiner acknowledges that Hastings does not show this type of operation, and instead states:

> Hastings does not expressly disclose (g) repeating step (e) when an automatic shipment option is enabled until said subscriber accepts an additional playable media item for delivery, but official notice is taken that it is well known for salespersons to repeatedly select items or information about items to be presented to potential customers. Hence, it would have been obvious to one of ordinary skill in the art of electronic commerce at the time of applicant's invention to repeat step (e) when an automatic shipment option is enabled until said subscriber accepts an additional playable media item for delivery, for the obvious advantage of providing the subscriber with a media item likely to be to his taste, thereby making people more likely to see subscribing as worth the money.

The citation by the Examiner is inapplicable because this is not a situation where a salesman is presenting something to a "potential" customer. In the present claims there is already a subscriber – not a potential customer - who is receiving content. The system operates to ensure that the subscriber receives a steady supply of content that they are already paying for.

Finally, the motivation cited by the Examiner above (...*making people more likely to see subscribing as worth the money*...) is taken directly from the applicant's own disclosure, and hence is classic hindsight.[9] As noted by the Supreme Court, a "factfinder should be aware . . . of the distortion caused by hindsight bias and must be cautious of arguments reliant upon ex post reasoning." <u>KSR Int'l Co. v. Teleflex, Inc</u>. 550 U.S. at 421 (citation omitted). For these reasons Appellant submits that the rejection of claim 36 is clearly in error.

---

[9] <u>See</u> page 33 of the disclosure as filed: "…. In general, from a *customer satisfaction* perspective, *it is desirable to always have at least one title of interest in the possession of the customer*, and to reduce stock-out of particular titles for such customer. By identifying potential "weak points" *the system can preempt and reduce customer defections* by preventing stock-out." The Examiner's argument basically tracks this discussion.

VIII.   CLAIMS

A copy of the claims involved in the present appeal is attached hereto as
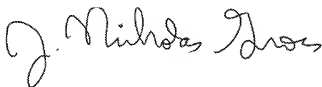Appendix A.

IX.   EVIDENCE

No additional evidence pursuant to §§ 1.130, 1.131 or 1.132 or entered by or
relied upon by the Examiner is being submitted.

X.   RELATED PROCEEDINGS

Appendix B is a copy of the prior decisions rendered by the BPAI, to the extent
the panel believes it is useful to refer to the same.

Respectfully submitted,

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APPENDIX A

1.   A method of distributing playable media items over an electronic network from a first computer maintained by a provider of a media distribution service to a second computer used by a subscriber of such service, the playable media items corresponding to machine readable media readable by a subscriber machine player, the method comprising the steps of:

> (a) setting up a subscriber selection queue for the subscriber to be controlled by the first computer, said subscriber selection queue consisting of an ordered list of one or more playable media items to be delivered to the subscriber in a subscriber-defined priority;
>
> wherein said subscriber selection queue is set up at least in part in response to item selection directions provided by the subscriber over the network using the second computer;
>
> (b) setting up queue replenishment control rules for the subscriber selection queue including an automatic queue refill option; and
>
> (c) monitoring said subscriber selection queue in accordance with said queue replenishment control rules to automatically determine with said first computer if an additional playable media item should be added to said subscriber selection queue; and
>
> (d) automatically modifying said subscriber selection queue with said first computer to generate a new ordered list of one or more playable media items in response to the subscriber confirming that said additional playable media item can be included in said subscriber selection queue;
>
> wherein steps (c) and (d) are repeated as needed when said automatic queue refill option is enabled so that said subscriber selection queue is maintained automatically for the subscriber so as to include at least one playable media item which is accepted for delivery by such subscriber.

2. The method of claim 1, wherein the subscriber does not need to be connected to the provider over the network during step (c).

3. The method of claim 1 wherein said ordered list of one or more playable media items are set up by said subscriber-defined priority in a delivery sequence ranging from a first playable media item to be delivered from said subscriber selection queue to a last playable media item to be delivered from said subscriber selection queue.

4. The method of claim 3, wherein said additional playable media item is automatically inserted in a subscriber-defined delivery order position in said new ordered list of one or more playable media items.

5. The method of claim 3, wherein said additional playable media item is automatically inserted as said first playable media item to be delivered from said new ordered list of one or more playable media items.

6. The method of claim 3, wherein said additional playable media item is automatically inserted as said last playable media item to be delivered from said new ordered list of one or more playable media items.

7. The method of claim 1, further including a step of: delivering playable media items to the subscriber based on said new ordered list of one or more playable media items.

8. The method of claim 1, wherein step (d) is performed automatically without sending a further notification to the subscriber.

9. The method of claim 1, further including a step (c)': sending a notification to the subscriber after step (c) when said queue replenishment control rules determine that said subscriber selection queue should be modified.

10. The method of claim 9, wherein said notification does not automatically trigger a modification of said subscriber selection queue.

11. The method of claim 9, wherein said notification specifies that said subscriber selection queue will be automatically modified in accordance with said queue replenishment control rules.

12. The method of claim 9, wherein said notification specifies that said subscriber selection queue will be automatically modified in accordance with said queue replenishment control rules and includes an embedded embedded uniform

resource links (URL) or an electronic response field in said electronic notification so as to allow the subscriber to review playable media title recommendations from said recommender system.

13. The method of claim 12, wherein said subscriber selection queue is automatically modified in accordance with said queue replenishment control rules after a predefined time delay.

14. The method of claim 9, wherein said notification provides directions for the subscriber to accept and/or modify said additional playable media item.

15. The method of claim 1, wherein said queue replenishment control rules include a trigger event to be used in determining when said subscriber selection queue should be modified.

16. The method of claim 15, wherein said trigger event is associated with a quantity of playable media items remaining in said subscriber selection queue.

17. The method of claim 15, wherein said trigger event is associated with a determination by an item recommendation system that said additional playable media item should be added to said subscriber selection queue as a recommended playable media item.

18. The method of claim 17, wherein said recommended playable media item is designated as the next to be delivered from said subscriber selection queue.

19. The method of claim 1, wherein said additional playable media item is automatically determined by a recommender system controlled by the provider of the media distribution service, which recommender system automatically identifies playable media items of interest to the subscriber based on a subscriber item preference profile.

20. The method of claim 19, further including a step of: processing an item rating survey provided by the subscriber to determine a subscriber item preference profile suitable for use by said recommender system.

21. The method of claim 1, wherein said additional playable media item is randomly selected from a list of playable media items associated with a category selected by the subscriber.

22. The method of claim 1, wherein said queue replenishment control rules and the subscriber selection queue are set up automatically for the subscriber based on

23. The method of claim 1, wherein said queue replenishment control rules for the subscriber selection queue are set up by the subscriber.

24. The method of claim 1, further including a step (e): moving an item from said subscriber selection queue to a shipping queue when the subscriber is eligible to receive an additional item.

25. The method of claim 19, further including a step of: processing an item rating survey provided by the subscriber to determine a subscriber preference profile suitable for use by said recommender system.

26. The method of claim 1, further including a step of: receiving subscriber feedback concerning a performance of said media distribution service concerning selection of said additional playable media item.

27. The method of claim 1, wherein a subscriber account is charged a fee when an additional playable media item is moved to said subscriber selection queue.

28. The method of claim 1, wherein the media distribution service distributes movies to the subscribers.

29. The method of claim 28, wherein the media distribution service is an Internet based movie rental service, and the playable media items are recordings of movies that are mailed to subscribers.

30. The method of claim 29, wherein the subscriber pays a flat rate service fee for having a predetermined number of recordings checked out of the Internet based movie rental service.

31. The method of claim 30, wherein a subscriber account is charged an additional fee when an additional playable media item is actually distributed to the subscriber.

32. The method of claim 28, wherein said movies are distributed electronically to the subscribers.

33. The method of claim 32, wherein said movies are distributed by a satellite transmission to a satellite signal receiver.

34. The method of claim 32, wherein said movies are distributed by a broadband Internet-based connection.

35. A method of distributing playable media items comprising the steps of:

    (a) setting up a subscriber selection queue for the subscriber, said subscriber selection queue consisting of a list of one or more playable media items to be viewed by the subscriber;

wherein said subscriber selection queue is set up at least in part in response to item selection directions provided by the subscriber;

    (b) setting up queue replenishment control rules for the subscriber selection queue including an automatic queue refill option; and

    (c) automatically monitoring said subscriber selection queue in accordance with said queue replenishment control rules to automatically determine with a first computing system if changes should be made to said subscriber selection queue;

wherein said monitoring includes analyzing the content and/or characteristics of other playable media items within said subscriber selection queue to determine said changes; and

    (d) automatically modifying said subscriber selection queue with said first computing system to generate a new list of one or more playable media items based on a confirmation from the subscriber;

wherein steps (c) and (d) are repeated as needed when said automatic queue refill option is enabled so that said subscriber selection queue is maintained automatically for the subscriber so as to include at least one playable media item which is accepted for delivery by such subscriber.

36. A method of distributing playable media items over an electronic network to a subscriber of a media rental service, the method comprising the steps of:

(a) receiving subscriber preference data for the subscriber during a first data session, including notification options and automatic shipment options;

(b) generating a subscriber profile for the subscriber suitable for use by a recommender system;

(c) processing said subscriber profile using said recommender system to identify a media item that is likely to be of interest to the subscriber ;

(d) notifying the subscriber and shipping said media item to the subscriber in accordance with said subscriber preference data;

wherein said media item can be automatically shipped to the subscriber after said first data session, and without requiring a second data session by the subscriber with said media rental service;

(e) repeating step (c) to automatically select and maintain at least one additional media item to be available for immediate delivery to the subscriber at all times;

(f) delivering said at least one additional playable media item when it is accepted by the subscriber;

(g) repeating step (e) when an automatic shipment option is enabled until said subscriber accepts an additional playable media item for delivery.

UNITED STATES PATENT AND TRADEMARK OFFICE

APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

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Ex parte JOHN N. GROSS

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Appeal 2009-2646
Application 10/770,937
Technology Center 3600

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Decided: March 30, 2009

————————

Before MURRIEL E. CRAWFORD, ANTON W. FETTING, and
JOSEPH A. FISCHETTI, Administrative *Patent Judges*.

FISCHETTI, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Appellant seeks our review under 35 U.S.C. § 134 of the Examiner's
final rejection of claims 1-36. We have jurisdiction under 35 U.S.C. § 6(b).
(2002)

SUMMARY OF DECISION

We AFFIRM.

THE INVENTION

Appellant claims a system and method for monitoring purchase orders and/or rental selections made by consumers, and providing automatic selections, notifications, shipments and exchanges of new items. (Specification 1:11-13)

Claim 1, reproduced below, is representative of the subject matter on appeal.

> 1.   A method of distributing playable media items over an electronic network from a first computer maintained by a provider of a media distribution service to a second computer used by a subscriber of such service, the playable media items corresponding to machine readable media readable by a subscriber machine player, the method comprising the steps of:
>
> (a) setting up a subscriber delivery queue for the subscriber to be controlled by the first computer, said subscriber delivery queue consisting of an ordered list of one or more playable media items to be delivered to the subscriber in a subscriber-defined priority;
> wherein said subscriber delivery queue is set up at least in part in response to item selection directions provided by the subscriber over the network using the second computer;
>
> (b) setting up queue replenishment control rules for the subscriber delivery queue; and
>
> (c) monitoring said subscriber delivery queue in accordance with said queue replenishment control rules to

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automatically determine with said first computer if an additional playable media item should be added to said subscriber delivery queue; and

(d) automatically modifying said subscriber delivery queue with said first computer to generate a new ordered list of one or more playable media items in response to the subscriber confirming that said additional playable media item can be included in said subscriber delivery queue;
wherein said subscriber delivery queue is maintained automatically for the subscriber so as to include at least one playable media item which could be delivered to such subscriber.

THE REJECTION

The Examiner relies upon the following as evidence of unpatentability:

Davis	US 6,105,006	Aug. 15, 2000
Berstis	US 6,105,021	Aug. 15, 2000
Kamel	US 2001/0014145 A1	Aug. 16, 2001
Jacobi	US 6,317,722 B1	Nov. 13, 2001
Kolawa	US 6,370,513 B1	Apr. 9, 2002
Nakagawa	US 2002/0046129 A1	Apr. 18, 2002
Raphel	US 2003/0023743 A1	Jan. 30, 2003
Hastings	US 6,584,450 B1	Jun. 24, 2003
Postelnik	US 2006/0218054 A1	Sep. 28, 2006

M.A. Ostrom, "With newer releases, Netflix users can anticipate a 'very long wait'" The Mercury News, July 7, 2002.

The following rejections are before us for review.

1. The Examiner rejected claims 1, 2, 3, 4, 7, 8, 15, 17, 18, 19, 20, 21 23, 24, 28, 29, 30, and 31 under 35 U.S.C. 103(a) as being unpatentable over Hastings in view of Ostrom.

2. The Examiner rejected claim 5 as unpatentable under § 103 in light of the rejection (1) above and further in view of Raphel.

3. The Examiner rejected claim 6 as unpatentable under § 103 in light of the rejection (1) above and further in view of Berstis.

4. The Examiner rejected claims 9, 10, 11 are unpatentable under § 103 in light of the rejection (1) above and further in view of Postelnik.

5. The Examiner rejected claim 12 as unpatentable under § 103 in light of the rejection (1) above and further in view of Jacobi.

6. The Examiner rejected claim 13 as unpatentable under § 103 in light of the rejection (1) above and further in view of Davis.

7. The Examiner rejected claim 14 as unpatentable under § 103 in light of the rejection (1) above and further in view of Nakagawa.

8. The Examiner rejected claim 16 as unpatentable under § 103 in light of the rejection (1) above and further in view of Kamel.

9. The Examiner rejected claims 20, 21, 25 26, 27, 32, 33, 34 are unpatentable under § 103 in light of the rejection (1) above and further in view of Official Notice.

10. The Examiner rejected claim 36 as unpatentable under § 103 in light of Hastings taken with Kolawa and Official Notice.

ISSUE

Has Appellant shown that the Examiner erred in rejecting claims 1, 2, 3, 4, 7, 8, 15, 17, 18, 19, 20, 21, 23, 24, 28, 29, 30, and 31 under 35 U.S.C. 103(a) as being unpatentable over Hastings in view of Ostrom on the grounds that a person with ordinary skill in the art would have known that the MAX TURNS rules which control the output of titles to the customer in Hastings also cause the delivery queue to be maintained automatically for the subscriber so as to include at least one playable media item which could be delivered to such subscriber.

Has Appellant shown that the Examiner erred in rejecting the remaining claims on appeal under 35 U.S.C. 103(a) as being unpatentable over Hastings in view each of several other references in that a person with ordinary skill in the art would have known to make such combinations.

FINDINGS OF FACT

We find the following facts by a preponderance of the evidence:

1. The Examiner found that Hastings discloses
   (c) monitoring said subscriber delivery queue in
   accordance with said queue replenishment rules;
   wherein said subscriber delivery queue is
   maintained automatically for the subscriber so as
   to include at least one playable media item which
   could be delivered to such subscriber (ibid.).
   (Answer 5)

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2. Ostrom discloses:

> Selecting from nearly 12,000 titles, Netflix
> subscribers create a list of movies in order of
> preference. Movie requests are generally fulfilled
> on a first-come, first-serve basis. If a top pick isn't
> available, Netflix sends the next movie on the list.
> While savvy subscribers reorder their preference
> list regularly to ensure that the new releases stay at
> the top, even that is not a guarantee… (Ostrom,
> p.1)

3. The Specification describes:

> A Subscriber Delivery Queue Module 723 controls
> and updates subscriber delivery queues in response
> to subscriber selections, automatic return and
> shipping instructions issued by Media Processing
> Module 722 (such as when a title is returned) and
> based on a Intelligent Queue Monitor module 726
> described below. (Specification 25: 10-19)

4. Hastings discloses "If the specified number of items are currently
rented to customer 102 and the specified item delivery criteria triggers the
delivery of one or more additional items, then those items are not delivered
until one or more items are returned by customer 102 to provider 104."
(Hastings, col.5, ll. 44-49)

5. Hastings discloses

> Instead of identifying particular movie titles, the
> movie selection criteria may specify movie
> preferences for customer 502, e.g., types of
> movies, directors, actors, or any other movie
> preferences or attributes. In this situation, provider
> 504 automatically selects particular titles that

satisfy the movie selection criteria. For example,
the movie selection criteria may specify a
preference for action movies starring a particular
actor, with a preference for "new release" movies.
Provider 504 attempt to provide movies to
customer 502 that best satisfy the preferences
indicated by the movie selection criteria.
(Hastings, col. 10, ll. 3-14)

6. Hastings discloses
If, in step 612, a determination is made that the
"Max Turns" limit has been met for the current
cycle, i.e., in the present example, four movies 512
have been mailed to customer 502 in the current
month, then in step 614 a determination is made
whether to override the current "Max Turns" limit.
If so, then in step 616, a surcharge is applied to
customer 502 and control returns to step 608 where
the additional movies 514 are mailed to customer
502. If not, then in step 618, a determination is
made whether to continue the subscription service.
If so, then no additional movies are mailed to
customer 502 during the current cycle, e.g., the
current month, and the control returns to step 610.
If, in step 618, a determination is made that service
is not to be continued, then the process is complete
in step 620. (Hastings, col.10, ll. 52-64)

7. The Examiner found:
Hastings discloses the user providing movie
selection criteria such as types of movies, actors,
directors, etc. (column 9, line 63, through column
10, line 14). Thus, Hastings's method would have
to involve analyzing "other playable media items"
to determine what type of movies they were, who

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the actors and directors were, etc., in order to accomplish Hastings's disclosed purpose. (Answer 22-23)

8. The Examiner found with respect to claim 9 that:

Hastings does not disclose sending a notification to the subscriber after step (c) when the queue replenishment control rules determine that the subscriber delivery queue should be modified, but it is well known to send customers notifications of pending deliveries, modifications to their orders, etc., as taught,, for example, by Postelnik (paragraph 74). Hence, it would have been obvious to one of ordinary skill in the art of electronic commerce at the time of applicant's invention to send such a notification, for such obvious advantages as assuring a subscriber of the imminent shipment of desired items, or enabling a subscriber to modify his preference list to receive a more desired item (as set forth in Ostrom). (Answer 9)

9. The Examiner found with respect to claim 12 that:

Hastings does not disclose that the notification includes an embedded uniform resource link (URL) or an electronic response field in the notification so as to allow the subscriber to review playable media title recommendations from a recommender system, but Jacobi teaches notifications including hyperlinks to allow a user to review recommendations from a recommender system (column 10, lines 54-62). Hence, it would have been obvious to one of ordinary skill in the art of electronic commerce at the time of

applicant's invention for the notification to include
an embedded uniform resource link (URL) or an
electronic response field, for the obvious
advantage of profiting from selling (or renting)
items to the subscriber that the subscriber is likely
to be interested in. (Answer 10-11)

10. The Examiner found with respect to claim 13 that

Hastings does not disclose that the subscriber
delivery queue is automatically modified in
accordance with the queue replenishment rules
after a predefined time delay, but it is well known
to take action after a predefined time delay, as
taught, for example, by Davis (column 23, lines
16-26). Hence, it would have been obvious to one
of ordinary skill in the art of electronic commerce
at the time of applicant's invention for the
subscriber delivery queue to be automatically
modified in accordance with the queue
replenishment rules after a predefined time delay,
for at least the obvious advantage of giving
someone (the subscriber, or an administrator), time
to make any manual modification which seem
indicated. (Answer 11)

11. The Examiner found with respect to claim 14 that

Hastings does not disclose that the notification
provides directions for the subscriber to accept
and/or modify said additional playable media item,
but Ostrom, as noted, discloses the subscriber
modifying (or, by default, accepting) a list, and it
is well known to provide directions, as taught, for
example, by Nakagawa (display of directions in
paragraph 41). , Hence, it would have been
obvious to one of ordinary skill in the art of

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> electronic commerce at the time of applicant's
> invention to provide such directions, for the
> obvious advantage of enabling the subscriber to
> readily modify (or accept) the queue according to
> his wishes. (Answer 11-12)

12. The Examiner found with respect to claim 15 that "…Hastings discloses a trigger event to determine delivery of an item to a subscriber (column 5, lines 1-14; column 14, lines 1-17), which implies modifying the subscriber delivery queue (at least by deleting the item now delivered)." (Answer 7)

13. The Examiner found with respect to claim 16 that:

> Hastings does not disclose that the trigger event is
> associated with a quantity of playable media items
> remaining in said subscriber delivery queue, but a
> trigger event could be associated with a quantity of
> playable media items remaining in the delivery
> queue in several ways (e.g., the queue might have
> become too large or too small), and it is well
> known at least to add additional items to a queue
> which has become too small, as taught, for
> example, by Kamel (paragraphs 161, 162, 167, and
> 168). Hence, it would have been obvious to one of
> ordinary skill in the art of electronic commerce at
> the time of applicant's invention for the trigger
> event to be associated with a quantity of playable
> media items remaining in said subscriber delivery
> queue, for the obvious advantage of assuring an
> adequate quantity of playable media items in the
> queue. (Answer 12)

PRINCIPLES OF LAW

"Section 103 forbids issuance of a patent when 'the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains.'" *KSR Int'l Co. v. Teleflex Inc.*, 127 S.Ct. 1727, 1734 (2007). The question of obviousness is resolved on the basis of underlying factual determinations including (1) the scope and content of the prior art, (2) any differences between the claimed subject matter and the prior art, (3) the level of skill in the art, and (4) where in evidence, so-called secondary considerations. *Graham v. John Deere Co.*, 383 U.S. 1, 17-18 (1966). *See also KSR*, 127 S.Ct. at 1734 ("While the sequence of these questions might be reordered in any particular case, the [*Graham*] factors continue to define the inquiry that controls.")

ANALYSIS

We affirm the rejection of claims 1-36.

Independent claim 1:

Appellant argues that "Ostrom says nothing about *automatically* determining whether an 'additional playable media item' should be added to the queue. It is merely repeating the fact that subscribers could add such items manually as is already disclosed in Hastings." (Appeal Br. 9) (Emphasis original) That argument is not well taken because the Appellant is attacking the reference individually when the rejection is based on a

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combination of references and the Examiner found that Hastings and not Ostrom teaches the automatically determining step feature (FF 1). *See In re Keller*, 642 F.2d 413, 426 (CCPA 1981); *In re Young*, 403 F.2d 754 (CCPA 1968). Notwithstanding, *see infra*, our discussion of the MAX TURNS feature of Hastings which we conclude includes an automatic determining feature.

Appellant further argues that "Similarly Ostrom does not "automatically" modify the subscriber queue, this is something that user must do on their own again." (Appeal Br. 9) In light of the breadth of the claim, the Appellant's argument is not persuasive as to error in the rejection because we interpret Ostrom's disclosure of Netflix sending the next movie on the list as modifying the list by decrementing the list by one which decremented list becomes the new list.

Appellant next argues that Hastings
    makes no mention anywhere of "monitoring" the
    subscriber's queue and using such information to
    determine an additional playable media item. He
    merely fills the queue with items which are from
    manual selections or with items automatically
    based on subscriber selection criteria…. (Appeal
    Br. 10)

The Examiner's position is that
    …this depends on what one understands
    monitoring the subscriber delivery queue to mean.
    If monitoring the queue must mean specifically
    monitoring the number of items in the queue,
    Appellant's contention is true. If monitoring the

> queue can mean monitoring subscriber selections
> and criteria associated with the queue, and, by
> implication, monitoring whether particular items
> are already in the queue, or have been in the past,
> then Hastings monitors subscriber delivery queues.
> Examiner may properly give the broadest
> reasonable interpretation to claim language in the
> course of examining claims. (Answer 21)

Claim 1 recites: ... *monitoring said subscriber delivery queue in accordance with said queue replenishment control rules to automatically determine with said first computer if an additional playable media item should be added to said subscriber delivery queue.* Thus, first, with regard to Appellant's argument above, the involved language does not use the conjunction "and" making the argument more specific than the scope of the claims. *See In re Self*, 671 F.2d 1344, 1348 (CCPA 1982).

Second, we agree with the Examiner that the mailing queue in Hastings, analogous to Appellant's Subscriber Delivery Queue, is monitored to the extent that Hastings determines or monitors the number of titles mailed to a customer in a given month (FF 6). That is, according to Hastings, the automatic return and shipping instructions are tied to MAX OUT or MAX TURNS rules which control the output of titles to the customer (FF 4, 6). This is similar to Appellant's Subscriber Delivery Queue which is described as controlled by a Subscriber Delivery Queue Module 723 which controls and updates subscriber delivery queues also in response to, *inter alia*, *automatic return and shipping instructions* issued by Media Processing Module 722 (FF 3).

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Thus, in the MAX TURNS mode, we read the automated determination as to whether the "Max Turns" limit has been met for the current cycle (FF 6) to be monitoring because the number of titles that have been mailed out is monitored. Further, this monitoring process results in a determination of whether further additional playable media should be mailed, e.g. added to the subscriber delivery queue for mailing when the current "Max Turns" limit is overridden to allow additional movies to be mailed to customer (FF 6). Moreover, in the case where the provider automatically selects the title for the customer and mails same to him/her (FF 5), another title is selected and added to the MAX TURNS queue over the set quota. In so doing, the MAX TURNS mode insures that for a given cycle, and for however many number of overrides occur, at least one playable media can be delivered to a subscriber. In light of the breadth of claim 1, the Appellant's argument is not persuasive as to error in the rejection.

Appellant does not argue the separate patentability of dependent claims 2, 3, 5, 6, 7, 8, 20, 21,23, 24, 25, 26, 27, 28, 29, 20, 31,32, 33 and 34 (Appeal Br. 12) which depend on claim 1. These claims fall with claim 1. *See,* 37 C.F.R. § 41.37(c)(1)(vii)(2004).

Claim 35:
    Appellant argues that Hastings has no mention of
        examining other items in the selection queue as
        part of a monitoring process, or even for
        determining what titles to send to a subscriber. The

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> only criteria noted by <u>Hastings</u> are parameters for
> movies given by the subscriber, which are never
> then associated with other titles within the
> subscriber's queue. This limitation is also not
> taught or suggested in the prior art, and is yet
> another reason why this claim should be allowed.
> (Appeal Br. 11)

The Examiner found that because Hastings discloses selection criteria
specifying preferences by a customer so as to automatically select particular
titles that satisfy the movie selection criteria, Hastings thus must examine
titles to be sure that they meet the selection criteria. (FF 7) In light of the
breadth of the claim, Appellant's argument is not persuasive as to error in
the rejection because the claim is broad enough to be covered by Hasting's
auto select mode.

Claim 4:

Claim 4 recites: *wherein said additional playable media item is
automatically inserted in a subscriber-defined delivery order position in said
new ordered list of one or more playable media items.*

Appellant argues that:

> <u>Ostrom</u> is not referring to an additional playable
> media item; it is referring to re-arranging a
> preexisting item in the subscriber's queue, or
> letting the subscriber add something manually.
> Thus, it does not teach permitting the subscriber to
> define the automatic insertion point of a new item.
> (Appeal Br. 12)

However, the claims only require the new ordered list be one in
number playable media item. Thus, the question of order becomes moot
when the claim is read as having only one media in the list. In light of the

breadth of the claim, the Appellant's argument is not persuasive as to error in the rejection.

Claim 9:

Claim 9 recites: *sending a notification to the subscriber after step (c) when said queue replenishment control rules determine that said subscriber delivery queue should be modified.*

Appellant argues that "Applicant finds no mention in <u>Postelnik </u>of notices for a subscriber delivery queue…." (Appeal Br. 12.) That argument is not well taken because the Appellant is attacking the reference individually when the rejection is based on a combination of references and Hastings discloses the subscriber delivery queue and Postelnik teaches the general concept of sending a notification back to a user as to a change in the status of an order (FF 8). This is not disputed. *See In re Keller*, 642 F.2d 413, 426 (CCPA 1981); *In re Young*, 403 F.2d 754, 757-58 (CCPA 1968).

Appellant does not argue the separate patentability of claims 10 and 11which depend on claim 9. These claims fall with claim 9. *See,* 37 C.F.R. § 41.37(c)(1)(vii)(2004).

Claims 12, 13, 14, 16

The Examiner found for each of these claims that the prior art discloses the feature not found in Hastings (FF 9-13). But, Appellant argues against these rejections citing the shortcomings of Hastings. These arguments are not well taken because the Appellant is attacking the reference individually when the rejection of these claims is based on a combination of references, and a reference other that Hastings is used to

teach the alleged shortcoming. *See In re Keller*, 642 F.2d 413, 426 (CCPA 1981); *In re Young*, 403 F.2d 754, 757-58 (CCPA 1968). We note however with respect to claim 16, that Kamel is cumulative given that Hastings discloses a queue of titles which remain un-mailed in queue until cleared by the MAX TURNS or MAXOUT rules (FF 6).

We note that the Examiner's reasoning behind the rejection of claim 15 is based on Hastings alone. In so doing, the Examiner found that Hastings teaches a trigger event (FF 12) which Appellant does not challenge.

Also, with respect to claims 12, 14, 15, and 16, Appellant further argues that "... there was no incentive or suggestion to include such in systems which practice the present claims." (Appeal Br. 13) To the extent Appellant seeks an explicit suggestion or motivation in the reference itself, this is no longer the law in view of the Supreme Court's recent holding in *KSR Int'l Co. v. Teleflex Inc.*, 127 S. Ct. 1727, 1741 (2007). Since the Examiner has provided some articulated reasoning with some rational underpinning for why a person with ordinary skill in the art would modify Hastings as proposed (FF 9-13), Appellant's argument is not persuasive as to error in the rejection. Thus, we do not find error in the rejections of claims 12-16.

Claims 17, 18, and 19

Appellant argues that Hastings does not automatically add titles to the subscriber's queue. We disagree for reasons set forth above related to FF 5.

Appellant further argues that "Hastings says nothing about bumping a

recommended title to the top of the queue, as set out in <u>claim 18.</u> However, claim 18 recites *wherein said recommended playable media item is designated as the next to be delivered from said subscriber delivery queue.* Thus, the Appellant's arguments "fail from the outset because . . . they are not based on limitations appearing in the claims . . .," and are not commensurate with the broader scope of claim 1 which states nothing about bumping a title. *In re Self*, 671 F.2d 1344, 1348 (CCPA 1982). Even still, in the case of an empty Queue, the next recommended title in Hastings would be the next delivered (FF 6). In light of the breadth of the claim, the Appellants' argument is not persuasive as to error in the rejection.

Claim 36

     We also affirm the rejection of dependent claim 36 since Appellant has not challenged such with any reasonable specificity (see In re Nielson, 816 F.2d 1567, 1572 (Fed. Cir. 1987)).

CONCLUSIONS OF LAW

     We conclude the Appellant has not shown that the Examiner erred in rejecting appealed claims 1-36 under 35 U.S.C. § 103(a) as unpatentable over the applied prior art of record.

DECISION

     The decision of the Examiner to reject claims 1-36 is affirmed.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a). *See* 37 C.F.R. § 1.136(a)(1)(iv) (2007).

<u>AFFIRMED</u>

vsh

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10/770,937	02/02/2004	John N. Gross	JNG 2004-1	1607

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EXAMINER
ROSEN, NICHOLAS D

ART UNIT	PAPER NUMBER
3625	

NOTIFICATION DATE	DELIVERY MODE
10/01/2009	ELECTRONIC

Please find below and/or attached an Office communication concerning this application or proceeding.

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jngross@pacbell.net
anthonygreek@gmail.com

UNITED STATES PATENT AND TRADEMARK OFFICE

_____

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

_____

Ex parte JOHN N. GROSS

_____

Appeal 2009-002646
Application 10/770,937
Technology Center 3600

_____

Decided: September 29, 2009

_____

Before, MURRIEL E. CRAWFORD ANTON W. FETTING and JOSEPH
A. FISCHETTI, *Administrative Patent Judges*.

FISCHETTI, *Administrative Patent Judge*.

DECISION ON REQUEST FOR REHEARING

STATEMENT OF THE CASE

Appellant has filed a Request for Rehearing under 37 C.F.R.
§ 41.52(a)(3) (2007) of our Decision of March 30, 2009. In so doing, the
Decision affirmed the rejections of claims 1-36 under 35 U.S.C. § 103(a) as
unpatentable over the base combination of Hastings in view of Ostrom, and
other various references applied to the dependent claims.

ANALYSIS

I. Appellant argues that "...the Board does not apparently realize is
that Ostrom is *not* teaching anything beyond what is already shown in
Hastings et al. The latter is directed to the operation of the Netflix website
and Ostrom is merely cumulative and repetitive of Hasting et al.s'
teachings." (Request 2). Appellant next states that "[t]he suggestion that
Ostrom is teaching something new or different is completely mistaken."
(Request 3). We disagree with Appellant because our use of Ostrom is
driven by its more complete description of certain aspects of the prior art
system, rather than by a difference in teaching as Appellant asserts. Since
Ostrom is not incorporated by reference in Hastings, it must be relied on and
applied as a separate reference.

II. Appellant argues that "[t]he Board confuses the re-ordering of the
list with the act of making sure the list always '...include(s) at least one
playable media item...'." (emphasis added)(Request 3). However, the
Appellant's arguments are not commensurate with the broader scope of
claim 1 which recites

> *to automatically determine with said first computer if an*

> *additional playable media item should be added to said*
> *subscriber delivery queue; and*
>
> > *(d) automatically modifying said subscriber delivery*
> > *queue with said first computer to generate a new ordered list of*
> > *one or more playable media items in response to the subscriber*
> > *confirming that said additional playable media item can be*
> > *included in said subscriber delivery queue.*

Claim 1 (emphasis added)

Such language does not require that the list always include at least one

playable media, as asserted by Appellant because the claim language is

conditional upon a confirming response back from the subscriber as to

whether to include the media or not. *See In re Self*, 671 F.2d 1344, 1348

(CCPA 1982).

III. Appellant next asserts "... that the Board, like the Examiner, is

trying to impart teachings/capabilities to <u>Ostrom</u> that are simply not there."

(Request 3). We disagree with Appellant because the portion of the

Decision which the Request points to here does not impart any

teachings/capabilities to Ostrom, but rather is a reading of Ostrom based on

the four corners of its disclosure and based on interpreting the claims using

common sense. Specifically, as the list is decremented, it is modified to

become a new list.

IV. Appellant reasserts the argument made in their Brief that "the act

of sending the next movie, even if it 'modifies' the list, does not cause the

subscriber delivery queue to be '...*maintained automatically for the*

subscriber so as to include at least one playable media item which could be

delivered to such subscriber.'" (Request 3). Again, the Board directs

Appellant to pages 13 and 14 of its Decision and to its analysis and

consequential findings that in Hastings "the MAX TURNS mode insures

that for a given cycle, and for however many number of overrides occur, at least one playable media can be delivered to a subscriber." (Decision, p. 14).

V. Appellant next argues that, "…there is no teaching, motivation or suggestion in the references to change the underlying behavior of Hastings et al. to include this type of operation. The Examiner and the Board do not dispute this lack of evidence." (Request 4). We disagree with Appellant. Nowhere in our Decision do we admit such a lack of evidence. More important, Appellant here presents for the first time an argument to the lack of teaching, motivation or suggestion for a majority of the claims. The only instance of such an argument being made in the Brief was on page 13 directed to only claim 16 and Kamel, and was not, as now, made to the general combination of Hastings and Ostrom. The Decision nevertheless points out that "[t]o the extent Appellant seeks an explicit suggestion or motivation in the reference itself, this is no longer the law in view of the Supreme Court's recent holding in *KSR Int'l Co. v. Teleflex Inc.*, 127 S. Ct. 1727, 1741 (2007)." (Decision 17).

VI. Appellant argues that with respect to our interpretation of Hastings, and how we have interpreted the MAX TURNS disclosures at pages 13 and 14 of our Decision, that such different interpretation constitutes a new ground of rejection because the "rejection is based on a new claim interpretation not previously presented to Appellant during prosecution…" and Appellant thus far has not "had a fair opportunity to react to the rejection." (Request 6). Since our interpretation differs from that taken by the Examiner, and Appellant has not had the opportunity to rebut same, we thus modify our Decision to designate it as a new ground of rejection under 37 C.F.R. § 41.50(b).

VII. Appellant's arguments to claims 9-14, and 16-19 are new, and were not presented in their Brief and thus will not be considered now.

VIII. Appellant argues that he argued claim 36 with specificity in his Brief. (Request 19). The sum total of Appellant's argument in his Brief to claim 36 was to repeat the limitations of the claims which we do not consider to be a reasonably specific argument. A statement which merely points out what a claim recites will not be considered an argument for separate patentability of the claim. See, 37 C.F.R. § 41.37 (c)(1)(vii) (2004).

DECISION

Our decision to affirm the decision of the Examiner to reject the claims on appeal under 35 U.S.C. § 103(a) over Hastings in view of Ostrom and various other references used to reject dependent claims has not been shown to have been erroneous. However, because in so affirming we used a different rationale than that articulated by the Examiner, we grant the request for rehearing only to the extent that we denominate the Decision a new ground of rejection under 37 C.F.R. § 41.50(b).

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a)(1)(iv) (2007).

<u>REHEARING GRANTED
ONLY AS TO DENOMINATE
A NEW GROUND OF REJECTION UNDER 37 CFR 41.50(b)</u>

mev

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